IN THE HIGH COURT OF JUDICATURE AT MADRASS

DATED: 3.12.2004

CORAM:

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

W.P.Nos.15146 of 2001 & 13230 of 2002
W.P.M.P.NO.22497 of 2001

M.K.S.Mohammed Rafi .. Petitioner in W.P.15146/2001

Prince Anthony Sagayam .. Petitioner in W.P.13230/2002

Vs.

1. Joint Commissioner of Customs
(Airport) Customs House,
Chennai-1. .. 1st Respondent in W.P.15146/2001

2. Deputy Commissioner of Customs,
(Airport) Preventive Department,
Custom House,
Chennai-1. .. 1st Respondent in W.P.13230/2002

3. Commissioner of Customs (Appeal)
Customs House, Chennai-1.

4. The Joint Secretary to Government,
(Revision Authority),
Government of India,
Ministry of Finance,
Department of Revenue,
New Delhi-1. .. Respondents 2&3 in both the W.Ps

Writ Petitions under Section 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus as stated therein.

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For Petitioner: : Mr. Mr.Satish Sundar
For Respondents: : Mr. S.Muthusamy, (ACGSC)
in W.P.No15146/01
For Respondents: Mr.K.Sridhar
SCGC in W.P.No.13230/02

Common order:-

Writ Petition No.15146 of 2001 has been filed by the

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petitioner praying to issue a Writ of Certiorarified Mandamus to call for the records relating to F.NO.373/38/B/2001-RA. Cus. Order No. 336/2001 dated 4.7.2001 by the third respondent and quash the same and to direct the respondents to release 12 Nos. of gold bars weighing 1399 grams valued at Rs.4,93,847/- to the petitioner on payment of redemption fine and duty.

2. Writ Petition No.13230 of 2002 has been filed by the petitioner praying to issue a Writ of Certiorarified Mandamus to call for the records relating to F.No.373/56/B/2001-RA. Cus. Order No.34/2002 dated 31.1.2002 confirming the orders of the first and second respondent the third respondent and quash the same and to direct the respondents to release the gold chain weighing 115 grams to the petitioner being the subject matter of O.S.61/2001/AIR on the file of the first respondent.

3. For the sake of convenience and for easy reference W.P.No.15146 of 2001 and W.P.No.13230 of 2002 are hereinafter referred to as the first writ petition and the second writ petition respectively.

4. In the affidavit filed in support of the W.P.No.15146 of 2001, the petitioner would submit that the petitioner was intercepted by the Customs Authority at Chennai Airport on 6.8.1999 when he came from Singapore as a passenger in Indian Airlines Flight No.556; that on examination of his baggage, the authorities are said to have recovered 12 gold bars totally weighing 1339 grams valued at Rs.4,93,847/-; that the petitioner in fact disputed the same that he had kept the gold bars under seizure only for Security purposes and he never had any intention to smuggle the same by concealment; that he was coerced by the authorities to give a statement as if he was carrying the gold as a carrier for someone for a small remuneration; that even before he could make a declaration, the gold bars have been seized.

5. The further case of the petitioner is that the first respondent took up the matter in adjudicating and by order dated 16.10.2000, has absolutely confiscated the gold bars, besides imposing a penalty of Rs.25,000/- in terms of Section 112 of the Customs Act, 1962; that the petitioner in the meantime was detained under COFEPOSA and spent one year detention in Central Prison, Chennai and Vellore; that in the mean time the prosecution proceeding was initiated under section 135 of Customs Act against him and he was convicted and sentenced.

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6. The further case of the petitioner is that he preferred appeal against the order of the first respondent before the second respondent and the second respondent by order dated 11.4.2001 has confirmed the order of the Lower Authority and has rejected the Appeal; that challenging the order of the 2nd respondent, the petitioner has filed a revision before the third respondent; that the third respondent by order dated 4.7.2001 has once again rejected the revision and confirmed the orders of the Lower Authorities. It is only testifying the validity of the said order, the petitioner has come forward to file this Writ Petition, praying for the relief extracted supra.

7. In the affidavit filed in support of the W.P.No.13230 of 2002, the petitioner would submit that the petitioner was intercepted by the Customs authority at Chennai Airport on 11.1.2001 when he came from Singapore; that on examination the petitioner he had in his person Gold chain weighing 115 gms. valued at Rs.47,265/-; that it is the case of the Department that the petitioner had tried to smuggle gold chain without proper declaration; that on the other hand the petitioner has been wearing the gold chain in his neck and therefore, there can be no concealment and it has come under 'personal effect'; that therefore, in terms of Section 77 of Customs Act r/w Baggage rules 1988, the petitioner is entitled to possess and bring the same without payment of duty as it was his 'personal effect'.

8. The further case of the petitioner is that the Lower Authority by order dated 11.1.2001 absolutely confiscated the gold chain and imposed Rs.5,000/- as penalty in terms of Section 112(a) of the Customs Act; that he preferred appeal against the order of the first respondent before the second respondent and the second respondent by order dated 30.4.2001 has confirmed the order of the Lower Authority and has rejected the Appeal; that challenging the order of the 2nd respondent, the petitioner has filed a revision before the third respondent; that the third respondent by order dated 31.1.2002 has once again rejected the revision and confirmed the orders of the Lower Authorities. It is only testifying the validity of the said order, the petitioner has come forward to file this Writ Petition, praying for the relief extracted supra.

9. During arguments, the learned counsel for the petitioner would submit that after 1992, the Government of India has liberalised the import of gold into the country by means of new policy; that by the said policy the gold which was sought to be imported is no longer a prohibited item in terms of the customs Act and exim policy; that it is the

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ratio of the Apex Court and other High Courts of India; that even in case when the gold is sought to be imported by means of concealment, after the year 1992, an option of redemption should be extended in terms of Section 125 of the Customs Act.

10. The learned counsel for the petitioner would further submit that the respondents 2 and 3 are acting on quasi judicial capacity in adjudicating the cases of various persons and Institution; that such adjudication have direct civil consequences insofar as they have the power to impose penalty, confiscate the goods etc.; that such a power vested with the authorities have to be used in a judicial way and not arbitrarily; that the reasoning of the authorities that the gold bars are smuggled into India is far from truth, as the gold is not a prohibited item but only at best be a restrictive item; that the third respondent has not taken into consideration the vital factor that the petitioner has suffered detention for nearly one year under COFEPOSA and also suffered conviction and fine by jurisdictional Court.

11. The learned Additional Central Government Standing Counsel appearing for the respondents would submit that the petitioners have imported gold without valid licence from the Reserve Bank of India; that first thing they are not entitled to bring gold into the country and the second thing they have not declared the goods; that sufficient opportunity has been given to them, but they have violated the rules. At this juncture, the learned Additional Central Government Standing Counsel would cite a decision reported in 2000(120) E.L.T. (Cal.) (Commissioner of Customs (Preventive) v. Uma Shankar Verma) wherein it has been held:

> "A bare perusal of the said provision leaves no manner of date that if the goods are prohibited then the option is with the Customs Authority to confiscate without giving any option to pay fine in lieu thereof but when the goods are not prohibited then the Customs Authority has no other option but to allow grant of an option to the party to pay fine in lieu of confiscation."

On such arguments, he would pray for dismissal of the above Writ Petition.

12. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing

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the learned counsel for petitioners in both the above writ petitions and the learned Additional Central Government Standing Counsel appearing on behalf of the respondents, what comes to be known is that the petitioner in the first of the above writ petitions has come forward to seek a writ of Certiorarified Mandamus to call for the records relating to the order passed by the third respondent dated 4.7.2001 and to direct the respondents to release the 12 gold bars weighing 1339 grams valued at Rs.4,93,847/-.

13. Likewise, in the above second writ petition, the petitioner therein has sought for a Writ of Certiorarified Mandamus to be issued to call for the records of the third respondent dated 31.1.2002 and to quash the same and to direct the respondents to release the gold chain weighing 115 grams valued at Rs.47,265/- to the petitioner.

14. On facts, it comes to be seen that both the petitioners were intercepted by the Customs Authorities at Chennai Airport respectively on 6.8.1999 and on 11.1.2001 who alighted from Singapore and on examination of the baggage of the petitioner in the first writ petition 12 gold bars were found concealed and the same were seized. On the part of the first writ petitioner he would argue to the effect that only for security purpose, the gold bars under seizure had been kept by him and he never had any intention to conceal the same and that he was squeezed by the authorities to give a statement that he was carrying the same on behalf of some one else. In the case of the above second writ petitioner, he was found wearing the seized commodity, a gold chain, around his neck and since the same was not declared, it has been seized.

15. The learned counsel for the petitioner in the first writ petition above would cite Section 77 of The Customs Act, 1962 and would argue to the effect that under this Section, the petitioners are entitled to bring the same without payment of customs duty as it is their "personal effect". On the part of the first writ petitioner, it would be argued that in terms of Section 77 of the Customs Act read with Baggage Rules 1988, the petitioner is entitled to possess and bring the same without payment of duty as it was his 'personal effect'

16. But, on the part of the learned Additional Central Government Standing Counsel appearing on behalf of the respondents, it would be argued that the petitioners have imported gold without valid licence from the Reserve Bank of India nor have they, in any manner, entitled to bring gold into the country; that secondly, they have not

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declared the goods brought by them as it is required under law; that in spite of sufficient opportunity having been afforded to them, they were not in a position to satisfy the authorities concerned regarding their bona fide intention in bringing the gold bars(12 Nos.) and gold ornaments respectively and for violation of the rules and the law, they have been confiscated passing the orders impugned and therefore the petitioners are not at all entitled to the relief sought for.

16. In the judgment cited by the learned Special Central Government Standing Counsel reported in 2000 (120) E.L.T. (Calcutta) (Commissioner of Customs (Preventive) Vs. Uma Shankar Verma), cited supra, it has been held that if the goods are prohibited, then Customs Authorities would have no option but to confiscate the goods particularly to permit them to pay the fine in lieu of confiscation thereafter and only in cases wherein the goods are not prohibited items, then the option is left with the Custom Authorities to allow the party to pay the fine in lieu of confiscation. The learned standing counsel would point out that in the facts and circumstances of the case in hand, since the goods are prohibited, no option is left with the Customs Authorities but to confiscate the goods and hence would seek to dismiss the above writ petitions.

17. On the part of the petitioners, it would be argued that besides confiscation of the goods seized and imposing a penalty of Rs.25,000/- under Section 112 of the Customs Act, 1962, the petitioner in the above first case was also detained under COFEPOSA for one year and in the meantime, the prosecution proceeded under Section 135 of the Customs Act, 1962 and since the appeal preferred by him also came to be dismissed confirming the orders of the lower authorities, the petitioner has filed a revision before the 3rd respondent and on rejection of the revision confirming the earlier orders, now the petitioner has come forward to file the above writ petition. Likewise, in the second writ petition above also, all the above legal formalities have been complied with and the orders passed thereon by the statutory authorities concerned are now being challenged in the writ petitions.

18. The petitioner would put up the arguments to the effect that now under the liberalized policy pertaining to the import of gold into the country, it is no longer a prohibited item in terms of Customs Act, 1962 and exim policy and even in the event wherein the gold ought to have been imported by means of consignment, the option of redemption should have been exercised in terms of Section

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125 of the Customs Act.

19. But, on the part of the respondents it would be vehemently argued to the effect that neither the import policy of the Government has been liberalized to that extent so as to import any gold without control and the relevant provisions of the Customs Act are still in force and primarily the importer must be authorized to bring the commodity and consequently he must declare regarding the item brought into the country but in the cases in hand both these conditions have not been followed and the gold seized was smuggled into the country. In the course of arguments, the learned counsel though agrees to the effect that policy is some what liberalized, it has not been done to that extent so as to freely import gold into the country without following the procedures established by law and in the case of the petitioners, it is a flagrant violation of the Customs and Central Excise Act and Rules and therefore the confiscation of the same is fully justified in law. Citing the judgment, extracted supra, it would be further argued that not even any option could be exercised by the Customs Authorities under Section 125 of the Customs Act, 1962 and hence in the case in hand, the option to pay the fine in lieu of confiscation could not be exercised since in the facts of the case, the said option is not exercisable by the authorities concerned and hence the only option left with them is confiscation and therefore it has been rightly confiscated by the authorities by the orders impugned. Neither Section 77 nor Section 125 which are benevolent Sections meant for other categories could come to the rescue of the petitioners from effecting the confiscation of the seized gold and hence would seek to dismiss both the above writ petitions.

20. In consideration of the facts and circumstance pleaded on the part of the petitioners, having regard to the materials placed on record and upon hearing the learned counsel for both and further adhering to the law pertaining to the subject and the propositions held by the Courts, it is clear that the petitioners have brought seized gold items absolutely in violation of the relevant provisions of law and Rules either by concealing the same or without declaration as warranted under the Rules and procedures. In the circumstances, confiscation of the gold items seized is the only answer and nothing else could be done in law and hence the petitioners are not entitled to the relief sought for nor is it necessary on the part of this Court to cause its interference into the impugned orders passed in both the cases connected to both the above writ petitions and the only course that is open for this court is to

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dismiss both the above writ petitions as devoid of merits. In result,

(i) Both the above writ petitions filed by the writ petitioners do not merit acceptance but only become liable to be dismissed and they are dismissed accordingly;
(ii) the impugned order of third respondent passed in F.No.373/38/B/2001-RA.Cus. Order No. 336/2001 dated 4.7.2001 in W.P.No.15146 of 2001 and the impugned passed by the third respondent in F.No.373/56/B/2001-RA. Cus. Order No.34/2002 dated 31.1.2002 in W.P.No.13230 of 2002 are hereby confirmed; and

(iii)Consequently, W.P.M.P. No. 22497 of 2001 is also dismissed;

However, there shall be no order as to costs in both the writ petitions.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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Copy to:

1. Joint Commissioner of Customs
(Airport) Customs House, Chennai-1.

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2. Deputy Commissioner of Customs,
   (Airport) Preventive Department,
   Custom House, Chennai-1.

3. Commissioner of Customs (Appeal)
   Customs House, Chennai-1.

4. The Joint Secretary to Government,
   (Revision Authority),
   Govt. of India, Ministry of Finance,
   Department of Revenue,
   New Delhi-1.

+1cc to Mr.K.Sridhar, Advocate Sr 52697

+1cc to S.Muthusamy ACGSC Sr 52825

+2cc to B.Satish Sundar Sr 52650 and 52651

TS (CO)
km/24.1.

W.P.Nos.15146/01 &
13230/2002
W.P.M.P.NO.22497/2001

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